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Constitutional Law

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VII. Departmental Separation of Governmental Powers [§§ 246–312]

B. Executive Powers [§§ 255–258]

Topic Summary Correlation Table References

§ 255. Generally

The executive power is the power to execute the laws, that is, to carry them into effect, as distinguished from the power to make the laws and the power to judge them.[71] Ultimately, all executive power is granted by the Constitution, and the executive branch can exercise no power not derived from that instrument.[72]

The executive power is said by some to be more limited than the legislative powers, extending merely to the details of carrying into effect laws enacted by the legislature as they may be interpreted by the courts—the legislature having the power, except where limited by the Constitution itself, to stipulate what actions executive officers shall or shall not perform.[73] As are all of the three main branches of government,[74] the executive branch is independent of the other two.[75] However, unlike the monarchs of old, the President of the United States, though entitled to extreme deference in the conduct of his constitutional duties and obligations, is not above the law.[76] And in accordance with the general principle of the separation of powers, the executive department cannot generally usurp or exercise judicial[77] or legislative[78] power, and, by the same token, the executive power may not be encroached upon or interfered with by the judiciary.[79] It is as important to preserve and protect the powers of the executive branch of the government and its ability to function as it is to preserve and protect the other branches.[80]

The executive power also includes the power to administer the laws, and thus the promulgation of rules and regulations for such purpose is also an executive function.[81] Very often, executive power is taken to be the same as administrative power, or a power or function is described as "executive or administrative," and some state constitutions expressly recognize the executive power as including the administrative. The distinction between "executive" and "administrative" is that the former involves carrying out a legislatively completed policy while the latter involves legislative discretions as to policy in completing and perfecting the legislative process.[82]

Executive power includes the power to issue pardons[83] and reprieves,[84] and to grant or revoke paroles.[85] the exclusive authority to decide whether to prosecute and which alternative charges to pursue rests with the executive branch.[86]

The President has the authority to conduct the nation's foreign policy, and to recognize a foreign government.[87]

The right to make appointments to public office may, under certain circumstances, be exercised in whole or in part by other departments;^[88] however, that power has in a number of instances been regarded as an executive function.^[89]

The executive power need not, in all cases, be exercised directly and exclusively by the chief executive, but may be, in some instances, and most frequently is, delegated to subordinates.^[90]

CUMULATIVE SUPPLEMENT **Law Reviews and Other Periodicals**

Executive agreements and the (non)treaty power. 77 NC LR 133.

Cases:

Separation of powers doctrine was not violated by President's designation of a military commission to try enemy combatant alleged to have fought for al-Qaeda; Congress, through the joint resolution passed in response to the attacks of September 11, 2001, authorized use of "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the attacks, as well as through two statutes, authorized such commissions. Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), cert. granted, 126 S. Ct. 622 (U.S. 2005)

[END OF SUPPLEMENT]

[FN71] State for Use of Dept. of Corrections v. Pena, 911 P.2d 48 (Colo. 1996); Tucker v. State, 218 Ind. 614, 35 N.E.2d 270 (1941); Del Papa v. Steffen, 112 Nev. 369, 915 P.2d 245, 24 Media L. Rep. (BNA) 1879 (1996); Bourquin v. Cuomo, 85 N.Y.2d 781, 628 N.Y.S.2d 618, 652 N.E.2d 171 (1995), related reference, 231 A.D.2d 185, 659 N.Y.S.2d 933 (3d Dep't 1997); Richardson v. Tennessee Bd. of Dentistry, 913 S.W.2d 446 (Tenn. 1995).

The province of the executive branch is to see that the laws are faithfully executed. McDonnell v. Juvenile Court in and for Second Judicial Dist., 864 P.2d 565 (Colo. 1993).

Generally speaking, executive power is the power to enforce the laws. Gleason v. Samaritan Home, 260 Kan. 970, 926 P.2d 1349 (1996).

[FN72] Ex parte Quirin, 317 U.S. 1, 63 S. Ct. 2, 87 L. Ed. 3 (1942), order modified on other grounds, 63 S. Ct. 22 (U.S. 1942).

[FN73] State v. Huber, 129 W. Va. 198, 40 S.E.2d 11, 168 A.L.R. 808 (1946).

[FN74] § 250.

[FN75] State ex rel. S. Monroe & Son Co. v. Baker, 112 Ohio St. 356, 3 Ohio L. Abs. 266, 147 N.E. 501 (1925).

[FN76] U. S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974) (neither the doctrine of separation of powers nor the need for confidentiality of high level communications can, without more, sustain an absolute unqualified presidential privilege of immunity from the judicial process under all circumstances; however, it is necessary in the public interest to afford presidential confidentiality the greatest pro-

tection possible that is consistent with the fair administration of justice).

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Executive privilege with respect to presidential papers and recordings, 19 A.L.R. Fed. 472.

[FN77] In re Energy Resources Co., Inc., 871 F.2d 223, 19 Bankr. Ct. Dec. (CRR) 226, 20 Collier Bankr. Cas. 2d (MB) 1552, Bankr. L. Rep. (CCH) ¶72846, Unempl. Ins. Rep. (CCH) ¶14630A, 89-1 U.S. Tax Cas. (CCH) ¶9249, 63 A.F.T.R.2d (P-H) ¶89-1010 (1st Cir. 1989) (the Internal Revenue Service cannot, in any obvious way, circumscribe, by using an internal rule, a court's statutory powers).

And see, regarding limitations on the executive branch as respects the judiciary § 256.

[FN78] § 258.

[FN79] McDonnell v. Juvenile Court in and for Second Judicial Dist., 864 P.2d 565 (Colo. 1993) (generally, a district court does not have the right to interfere with the executive branch of government in performing its statutory duties).

[FN80] Brooks v. Pan Am. Loan Co., 65 So. 2d 481 (Fla. 1953) (disapproved on other grounds of by, A. B. C. Business Forms, Inc. v. Spact, 201 So. 2d 890 (Fla. 1967)).

[FN81] Missouri Coalition for Environment v. Joint Committee on Administrative Rules, 948 S.W.2d 125 (Mo. 1997), as modified on denial of reh'g, (Feb. 25, 1997).

[FN82]

Legal Encyclopedias

See 2 Am. Jur. 2d, Administrative Law §§ 68-70.

[FN83]

Legal Encyclopedias

See 59 Am. Jur. 2d, Pardon and Parole §§ 13-14.

[FN84] U.S. v. Williams, 15 F.3d 1356, 1994 FED App. 37P (6th Cir. 1994), reh'g and suggestion for reh'g en banc denied, (Apr. 4, 1994) and cert. denied, 513 U.S. 966, 115 S. Ct. 431, 130 L. Ed. 2d 344 (1994) and related reference, 43 F.3d 1473 (6th Cir. 1994).

[FN85] U.S. v. Fryar, 920 F.2d 252 (5th Cir. 1990), cert. denied, 499 U.S. 981, 111 S. Ct. 1635, 113 L. Ed. 2d 730 (1991) (parole revocation is an executive function).

[FN86] U.S. v. Spillman, 924 F.2d 721 (7th Cir. 1991), reh'g denied, (Mar. 4, 1991); State v. Thrift, 312 S.C. 282, 440 S.E.2d 341 (1994) (not followed on state law grounds, Com. v. Swinehart, 541 Pa. 500, 664 A.2d 957 (1995)).

The executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case. U. S. v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974).

A court will not exercise its supervisory powers over the administration of federal criminal justice to dismiss an interstate travel count after the defendant's plea agreement with prosecutors regarding drug conspiracy counts, since the Constitution commits the prosecutorial function to the executive branch, not the judicial, and it is the province of the government to decide the terms on which it will bring criminal indictments. U.S. v. Burns, 990 F.2d 1426 (4th Cir. 1993), cert. denied, 508 U.S. 967, 113 S. Ct. 2949, 124 L. Ed. 2d 696 (1993) and related reference, 16 F.3d 413 (4th Cir. 1994).

[FN87] U.S. v. Belmont, 301 U.S. 324, 57 S. Ct. 758, 81 L. Ed. 1134 (1937) (executive recognition of Russian soviet republic was operative and gave validity to previous acts of such republic).

The issue of whether individuals of Latvian, Lithuanian, and Estonian ancestry should be permitted to represent those nations in the opening ceremonies of the XXIIIrd Olympiad, the International Olympic Committee having determined that those nations should be represented by the Union of Soviet Socialist Republics, was a matter of a political nature, beyond the province of our courts of law, in that the U.S. Const., Art. II, § 2, specifically delegates to the President of the United States questions dealing with the relations between the United States and other nations. Spindulys v. Los Angeles Olympic Organizing Committee, 175 Cal. App. 3d 206, 220 Cal. Rptr. 565 (2d Dist. 1985).

[FN88] Sedlak v. Dick, 256 Kan. 779, 887 P.2d 1119 (1995) (under the Kansas Constitution, the appointment power does not reside exclusively in the executive branch).

Susolik, Separation of Powers and Liberty: The Appointments Clause, Morrison v. Olson, and the Rule of Law. 63 S Cal LR 1515, July, 1990.

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Supreme Court's construction and application of appointments clause of Art II, § 2, cl.2, of Federal Constitution, 101 L. Ed. 2d 1072.

Law Reviews and Other Periodicals

Blumoff, Separation of Powers and the Origins of the Appointment Clause. 37 Syr LR 1037, 1987.

Whitehouse, Appointments by the Legislature under the Rhode Island Separation of Powers Doctrine: The Hazards of the Road Less Traveled. 1 Roger Williams U LR 1, Spring, 1996.

[FN89]

Legal Encyclopedias

See 63C Am. Jur. 2d, Public Officers and Employees § 90.

[FN90] § 289.

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